Idaho Real Estate Commission
CORE 2008
HOT TOPICS

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I. 2007 YEAR-IN-REVIEW

To say that 2007 was an interesting year in Idaho real estate would be a gross understatement. Local, state and national events over the past 12 months have had an enormous impact on day-to-day real estate transactions. Some of those events, like the nationwide credit crunch, are still causing the real estate market to shift like sand beneath our feet. Before we get to that however, let's review a few matters that were addressed in last years' CORE course that bear repeating.

- Property tax homeowner's exemption.

  "*The point to remember is what the government gives, it must first take away*."

  ~ John S. Coleman

Understanding Idaho's property tax structure is not for the faint of heart. Under Idaho law, all taxable property is to be assessed based upon its market value each year. Taxable property includes real property such as land, and improvements attached to it, like manufactured homes. Personal property that is not used for business purposes isn't subject to property tax.

The amount of tax on real property is determined from the budgetary needs of the taxing districts where the real property is located. Idaho recognizes a number of different taxing districts. Cities and counties may levy taxes to provide a wide range of services. Other taxing entities like highway, school and fire protection districts levy taxes for a specific purpose. A taxing district's rate (or *levy*) is multiplied by the taxable value of real estate to determine the amount of taxes a property owner owes to a particular taxing district. A single property can be located within the boundaries of several independent taxing districts. While the tax rate for a district is the same for all taxable properties within the district, the tax rate is not the same for all districts in which a property is situated. Confused yet?

In Idaho, a homeowner can apply for a tax exemption on the value (or part of the value) of an occupied primary residence, including a manufactured home. The exemption applies to 50% of the value of the residence (including up to one acre of real property) or (**as of 2008**) <u>$100,938.00</u>, **whichever is less**. Property taxes are then computed on the non-exempt value of the real estate (i.e. – lesser of: market value - .50 OR market value - $100,938.00).

Effective last year (2007), the maximum amount for a homeowner's property tax exemption will now change each year. From 1983 to 2005, a span of 22 years, the maximum homeowner's property tax exemption was static at $50,000.00 or one half of the market value of the property. In 2006, that amount was raised uniformly to $75,000.00. Beginning in 2007, the exemption amount will no longer be uniform from year to year and will be tied to the Housing Price Index published by the United States Office of Housing Enterprise Oversight.

That does <u>not</u> mean that the homeowner must make application for the exemption each year. A homeowner can qualify for an exemption on only one home at a time provided that they own, occupy and apply for the exemption on the home before April 15th of the current year. The exemption is then continuous as long as that homeowner owns and occupies the property.

The homeowner's exemption applies without regard to income, age or legal status. Individual property owners might also be eligible for other forms of property tax relief is they meet income requirements and are seniors (age 65 or older), widowed, blind, former prisoners of war, fatherless or motherless minors, or persons with qualifying disabilities. Applications for these forms of tax relief must also be filed between January 1st and April 15th.

- <u>Assigned agency</u>.

2007 marked the first full calendar year following amendment of the Idaho Real Estate Brokerage Representation Act which allowed for "assigned" agency. Even with more than a year of experience under their belts, many licensees continue to struggle with the notion of assigned agency.

Idaho Code § 54-2083 defines an "assigned" agent as the sales associate assigned by the brokerage to act on behalf of one (1) client. It represents only that client consistent with the applicable duties set forth in Idaho Code § 54-2087 (*Duties to a Client*) even where the brokerage is representing more than one party to the transaction as a limited dual agent. In other words, if both the buyer and the seller are working with agents of the same brokerage, but each wishes to avail themselves to the statutory duties/protections owed to a "client," the responsible broker can assign or appoint a single sales agent to each (the buyer and the seller) and each of those assigned agents must fulfill all of the duties to a client set forth in Idaho Code § 54-2087. This means that even though a limited dual agency relationship exists with the brokerage, the broker (and <u>only</u> the broker) will be a true limited dual agent who may possess knowledge of confidential client information from both the buyer and the seller. The assigned agents representing each (the buyer and the seller) must maintain the client confidences and must advocate for, and consistent with, the best inserts of the client to whom that agent is assigned.

Fundamentally, this relationship is not difficult to grasp or apply, if one takes the time and effort to read and understand relevant provisions of the Idaho Brokerage Representation Act, paying particular attention to Idaho Code §§ 54-2083(3)(5) and (6); 54-2087; and 54-2088(1)(2) and (5).

- <u>Sloppy Contracts.</u>

"*Any contract for the sale of land … must be* ***complete****,* ***definite****, and* ***certain*** *in* ***all its terms***."

<u>Lettunich v. Key Bank</u>, 141 Idaho 362 (2005)

Probably no other single area is the source of as much continuing confusion and liability risk for licensees (brokers and salespeople alike), than the ubiquitous "sloppy" contract. The miscues of many agents in the fast-moving market of two years ago are now "coming home to roost." Licensees, who continue to be complacent in the use of pre-printed contract forms, place both themselves and their clients at enormous risk.

Purchase and Sale Agreements with blanks left blank; partial, or incomplete legal descriptions; agency confirmations which contradict the relationship between the licensee and the customer/client; and inadequate identification of the parties to the contract continue to be commonplace. As the old saying goes "*The Devil is in the details*." Agents who are sloppy with the regard to the details of the contracts they prepare will eventually get to meet the Devil, usually in the embodiment of a lawyer representing an unhappy customer or client.

Purchase and Sale Agreements are not the only important contracts that inattentive agents and brokers are prone to mess-up. Brokerage representation agreements, those all important documents which usually form the basis upon which an agent gets paid, if sloppily prepared, can be not only be contractually unenforceable but also statutorily deficient.

Idaho Code § 54-2050 provides that brokerage representation agreements with a seller "**must contain**" certain provisions, including a definite beginning and expiration date, a legally enforceable description of the property, a statement of the fees or commissions to be paid, price/terms the seller will accept, and, of course, a dated signature of the seller. Likewise, buyer representation agreements also "**must contain**" a conspicuous beginning and end date, a description of any financial obligation of the buyer for fees or commissions, and the manner in which the same will be paid. Necessary signatures and dates are also required. Neither type of representation agreement can contain an "automatic" renewal clause.

Any brokerage representation agreement not containing the statutorily required provisions is a violation of Idaho licensure law and would almost certainly render the contract unenforceable in a court of law.

II. FAIR HOUSING ISSUES ON RESERVATION PROPERTY

"*Have any of you ever been to a reservation? A guest house is a rusted car up on blocks out behind a h.u.d trailer*."

~ Sherman Alexie, Author

As all competent real estate agents know, the Fair Housing Act prohibits discrimination in the sale or rental of a dwelling, or the provision of services or facilities in connection with the sale or rental of real estate because of race, color, religion, sex, handicap, familial status, or national origin. Engaging in any conduct relating to the provision of housing which tends to make unavailable or denies housing to persons in these protected classes is illegal. So too is engaging in "blockbusting" or "steering" practices in connection with the sale or rental of real estate in reference to the protected classes.

According to the Code of Federal Regulations, Title 24 § 100.70, "*It shall be unlawful, because of race … or national origin to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns or to discourage or obstruct choices in a community, neighbor, or development*."

Prohibited acts "*include, but are not limited to; (1) Discouraging any person from inspecting, purchasing or renting a dwelling because of race … or national origin … of persons in a community, neighborhood or development. (2) Discouraging the purchase or rental of a dwelling because of race … or national origin, but exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of community, neighborhood or development. (3) Communicating to any prospective purchaser that he or she would not be comfortable or compatible with the existing residents of a community, neighborhood or development because of race … or national origin*." *See*, 24 CFR § 100.70(a).

Some real estate agents have inquired how the Fair Housing Act and related regulations come into play in transactions involving real estate on, or in the vicinity of, Indian Reservations. In Idaho, this is a legitimate cause for inquiry.

Presently there are five (5) Indian tribes with a significant physical presence in the state.[1] Four of those tribes possess significant real estate holdings in the form of reservation lands. The largest is the Nez Perce Reservation east of Lewiston which consists of about 770,000 acres of which the Nez Perce Tribe owns 86,248 acres and individual tribal members own an additional 37,950 acres.

The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now Northern Idaho and Northeastern Washington but now maintains a reservation south of Coeur d'Alene and north of Moscow. The full extent of its tribal boundaries was not established with finality until 2001 when the United States Supreme Court determined, among other things, that the United States government holds title (in trust) for the Coeur d'Alene Tribe, to lands underlying significant portions of Lake Coeur d'Alene and the St. Joe River; affecting thousands of acres of real estate which has become immensely marketable in recent years.

The Fort Hall Indian Reservation in Southeast Idaho, north and west of Pocatello is home to the Shoshone-Bannock Tribe. It consists of about 544,000 acres of which 96% is tribally owned or individually owned by tribal members. Like the Coeur d'Alene Reservation, Fort Hall's proximity to growing non-tribal communities such as Pocatello, Black Foot and the American Falls Reservoir area means that the reservation is often implicated in real estate sales transactions involving non-tribal members.

In addition to the impact of these established reservations, there are pending, unsettled land claims of the Shoshone-Paiutes in the vicinity of the Duck Valley Reservation south of Mountain Home, by the Shoshone-Bannock Tribe in the Boise Valley, and by the Kootenais in Boundary County which all have potential of becoming the catalyst for Fair Housing based claims.

- <u>A brief history of "Indian Country" land ownership.</u>

Broadly speaking, land on or near established reservations is called "Indian Country." After many years of evolution, dispute and development, the concept of Indian Country was given definition by the United States Congress in 1948. The term "Indian Country" means: "*(a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government … including rights-of-way running through the reservation, (b) all dependent Indian communities*

[1] *See*, Appendix "A"

within the borders of the United States … and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." *See*, 18 USCA § 1151. Property located in Indian Country may be owned by Indians and non-Indians alike subject to an almost inexhaustible collection of conditions, restrictions and limitations. Recognizing and articulating these limitations in an inartful manner is where the risk of an unintended Fair Housing Act violation can arise.

Indian lands (meaning those lands that are held by Indians or tribes under some restriction or some attribute peculiar to the Native American status of its owner) are not freely transferable. While any Indian can purchase real property in ordinary commerce regardless of its location, a non-Indian does not necessarily enjoy the same right to acquire land in Indian Country. The Indian purchaser acquires fee title that is freely transferable when purchasing non-Indian land. That property does not constitute "Indian land." Conversely, in many circumstances, non-Indians can not purchase or own "Indian lands" except upon the occurrence of extraordinary events (like an act of Congress - No, really, that may actually be required).

So what is the likelihood of a non-Indian (or their agent) being in a position to write a purchase contract for Indian land? In this state, it's certainly plausible. But, refusing to write the contract or "steering" the customer/client away from the property can raise a suspicion of intent to violate Fair Housing laws.

Lands presently set aside for Indians, whether by treaty, statute or executive order can be held under various forms of ownership. Nearly all of the land is in trust, with the United States holding legal title for the benefit of the Indians. In some cases the land is held by tribes with a restraint on alienation (sale or transfer) when the normal trust title is absent. When a tribe purchases fee land, there is no restraint on alienability. But, where title to Indian lands has been recognized by federal treaty or statute, that land is considered as being reserved to the tribe. Whether or not a treaty recognized title to particular tracts of land is the subject of great controversy on many reservations.

The desirability of Indian lands for potential (non-tribal) purchasers varies considerably from one person to the next. Issues such as tribal jurisdiction over non-tribal members (both criminal and civil); liability creating events which occur on tribal property or on state rights-of-way within a reservation; presence (or absence) of tribal zoning and land use regulations; tribal enforcement of those regulations; unique regulatory schemes imposed by tribes on residential and commercial development; and other similar concerns make the acquisition of even fee title property on recognized reservations problematic for many purchasers.

But do these concerns constitute *adverse material facts* which a real estate licensee is obligated to disclose to a buyer/client/customer? Or, does the mention of such matter potentially constitute “steering” or “blockbusting” in violation of the Fair Housing laws? The answer to these questions is largely dependent upon intent. There is virtually no reported case law, regulatory decisions or interpretative guidelines on the issue, so agents must remain mindful of the Fair Housing laws whenever dealing with Indian Country properties. Clearly any overt acts which are intended to discourage persons from inspecting or purchasing property merely because it is located in Indian Country is prohibited. However, advising prospective purchasers of limitations and restrictions which are unique to the property because of its proximity to, or location in, an established reservation is not discriminatory.

There is no question that property located on or near a reservation has unique characteristics recognized in law, which make it distinguishable from non-reservation properties. Evidence that HUD (which administers the Fair Housing Act) acknowledges this realty can be found in its recognition of the FHA § 248 loan program which allows borrowers to secure FHA insured residential loans for properties under tribal jurisdiction. This loan program is prominently advertised on HUD’s own website. The mere presence of the § 248 program seems to confirm that, if nothing else, reservation land is more difficult to finance than non-reservation land. No one could credibly argue that advising prospective purchasers of this fact constitutes discriminatory conduct under the Fair Housing Act even though it is significantly intertwined with the race, ethnicity, or national origin of the seller.

III. FORECLOSURES, SHORT SALES & BANKRUPTCIES, OH MY!

"*There is fraud in the market by people lying on loan applications, by loan officers, by appraisers, by bankers, by Wall-Streeters … when the truth comes out this is going to make Enron look like just a bump in the road*."

~ Ralph Roberts, Author

- A credit crunch arrives.

It's been called many things: the "lending crisis", the "mortgage meltdown", the "sub-prime collapse." Regardless of the name given, it is clear that 2007 represented a watershed year in the real estate mortgage lending markets. As a result of the convergence of events over the past 12 months, foreclosures, short sales and bankruptcies are THE "Hot Topic" in real estate today.

Consider some of the statistics – As of April 2008, 11% of all homes in the state of Mississippi were in foreclosure. During the month of February 2008, one in every 165 households in Nevada had received a foreclosure notice. In the fourth quarter of 2007, California and Florida combined for 30% of all foreclosure actions nationally, but all states were showing increased filings. Realtytrack.com statistics indicate that foreclosure activity from February 2000 to February 2008 is up 60% nationwide.

The percentage of properties in foreclosure in Nevada was up 95% in one year. In February 2008, 2,500 homes in metro Phoenix, Arizona were foreclosed upon. In just the final two months of 2007, almost a quarter of a million homes in the U.S. received foreclosure notices!

If you think Idaho's real estate market has been immune from these nationwide trends; think again. Between January 2007 and January 2008, statewide foreclosure filings in Idaho increased by whopping 92%. Ada County alone recorded 270 foreclosure filings in January of this year; a 44% spike over last January. Think that's bad? Canyon County's foreclosure filings in January 2008 represented a 240% increase over the same month just one year earlier!!

While these statistics spell doom for some homeowners/borrowers, the same numbers can represent opportunity for others. "*Foreclosure-investing*" is the real estate marketing buzzword right now. Foreclosure property promotion has become the new business model being utilized by some real estate agents. According to the Arizona Republic (March 29, 2008), local real estate agents are hosting bus tours to show groups of buyers available foreclosure properties. For a $97.00 fee, prospective purchasers get a ride through various subdivisions to look at bank-owned properties, a box lunch and an opportunity to chat with an enterprising real estate agent, a mortgage lender and property inspector. Similar bus tours of bank owned and pre-auction properties were held in Ada and Canyon Counties in early March of this year. (*No word on the success rate of these marketing efforts*)

- <u>How did this come about?</u>

The root problem beneath this wave of foreclosure activity is, in hindsight, pretty easy to identify. In fact, most observant people in the market at the time that the problems began were well aware of it. Unfortunately, a good number of those people also helped cause the problems. Ralph Roberts, author of *Foreclosure Investing for Dummies* is quoted as saying that he believes 80-90% of all foreclosures are rooted in loan fraud of some type.

According to Roberts' view of the world, a typical pre-2007 mortgage lending scenario went like this:

> "*A buyer doesn't qualify for a desired loan and therefore he fibs on the application. The underwriter discovers the truth and turns-down the loan. The underwriter's decision is overridden by the boss who perceives that more loans have to be written up to keep the doors of the mortgage brokerage open. The more "paper" fraud, the more profits*."

The obvious problem with this equation is that ultimately loans were made to people who, from an underwriting standpoint, shouldn't have received those loans in the first place. Is it any wonder these people failed to make their payments?

Other commentators take a more expansive view of the root causes of loan defaults: "*Sins of predatory lending don't change the ingredients of what leads up to most foreclosures*." Job loses, natural disasters and health problems can gravely impact a person's ability to repay even an appropriately underwritten loan. However, there is little doubt that self-inflicted causes such as gambling, substance abuse, divorce, excessive use of consumer credit and bad overall personal finances are a huge contributor to the problem. Unfortunately, regardless of the cause(s) the, "house of cards" has now begun its inevitable collapse.

For real estate agents, one thing is clear: properties in foreclosure, about to go into foreclosure or threatened with foreclosure are going to be much more common place for the near term. How foreclosure properties are marketed and how clients and customers deal with atypical seller motivation (a lender breathing down their neck) simultaneously creates risk and opportunity for the agent.

- **Short Sales.**

Some property owners facing the loss of their home to foreclosure will agree to sign away ownership to the lender hoping to "save" their credit and avoid bankruptcy ("*deed-in-lieu*"). These owners simply walk away with nothing to show for months or (sometimes) years of diligent compliance with the loan obligations. Most soon discover though that their credit worthiness has taken such a hit that they may never again qualify for a home loan. The bankruptcy that they sought to avoid usually follows. For owners who can no longer afford their mortgage payments, there are sometimes viable alternatives to filing bankruptcy or offering their lender a deed-in-lieu of foreclosure. One option that has become immensely popular is the "***short sale***."

When lenders authorize a ***short sale*** on real estate, it means the lender is agreeing to accept less than the total amount due on the homeowner's outstanding debt. Not all lenders will accept short sale proposals or will agree to a discounted payoff of the mortgage balance, but when compared to completing foreclosure and holding the property in inventory with potentially hundreds (or thousands) of other foreclosure properties, lenders are becoming much more motivated toward giving short sale proposals due consideration. Proceed with caution however. Short sales are no panacea (for the seller or his agent). There are significant consequences and some very real traps for the unwary.

- Phantom taxes.

One aspect of the short sale structure that is often overlooked by both sellers and their agents is "phantom" income tax liability. Cancellation or forgiveness of debt can carry with it significant tax implications for the seller. While real estate agents are not expected to be tax/financial advisors, they are expected to at least recognize where potential liabilities exist and advise client/sellers to seek appropriate consultation with a lawyer, accountant or tax advisor. Here's why: In a short sale, a lender may agree to forgive a substantial portion of the sellers' outstanding mortgage loan which would not be covered by the sale proceeds. Sellers are often relieved to have the chance to "walk away" and avoid bankruptcy. Unfortunately, most do not actually walk away with no further financial obligations.

In a short sale, the lender has several ways to deal with the deficiency balance, (the portion of the mortgage debt not covered by the proceeds from the sale of the home). If the loan is recourse debt (and it usually is), a lender might attempt to collect the deficiency balance from the seller after the property has sold. Alternatively, the lender may require as a condition of agreeing to the short sale, that the seller sign an unsecured promissory note for the deficiency balance. Or the lender might agree to simply cancel or forgive the deficiency balance. For most borrowers, this third option (debt "forgiveness") is the most attractive choice. However, the IRS considers any cancelled mortgage debt to be ordinary income to the seller. In other words, the amount of debt forgiven is taxed by the government at the same rate (between 15% and 30%) as the sellers' other income.

The lender will file a 1099-C form setting forth the amount of the cancelled debt. Failing (or neglecting) to include this reported income when the seller files their next Federal income tax return carries all of the unpleasant consequences of failing to report any other income. By the same token, even the seller who properly reports this phantom income still has to deal with the issue of how to eventually pay income tax on money they never actually received. Or did they? Some would argue that it's unfair to be taxed on money you don't actually receive. Others would argue you <u>do</u> receive the money when the loan funds and you buy the property, therefore, when part of the obligation to repay that money is forgiven or waived, it's the same as if the lender had given you cash. At least for the next 3 years this argument is largely academic in many instances.

- <u>Tax relief for borrowers.</u>

On December 20, 2007, President Bush signed into law the Mortgage Forgiveness Debt Relief Act of 2007 (the "Act"). Under the Act, tax payers can "exclude" up to $2,000,000.00 of forgiven mortgage debt on the sale of their principal residences in the years 2007, 2008 or 2009. However, the Act is <u>not</u> all-encompassing. Some properties/mortgages will qualify, many will not.

Sellers will still receive a 1099-C form from their lender and will still have to file that form with their tax return together with a specific claim form and documentation of the fair market value of the home sold. Tax exclusion under the Act is limited. The debt forgiven must be from a primary mortgage on the tax payer's principal residence. That status ("principal residence") is determined based upon the amount of time the property was lived in over the preceding five years. Therefore, rental, investment and speculation properties sold by short sale will not be eligible. Additionally, the mortgage forgiveness must result from the loss of market value forcing a short sale in connection with a pending foreclosure. If the lender accepts, for example, services in lieu of payment for the forgiven debt, the Act does not apply.

The debt must be forgiven between January 1, 2007 and January 1, 2010. Last, the debt forgiveness must be on a mortgage for "*acquisition indebtedness*" which is money spent to buy the home, build home or make substantial improvements to it. Second, third or fourth, etc. mortgages/deeds of trust and home equity credit lines do <u>not</u> qualify under the Act.

Calculating the "benefits" of the Act can be challenging. Suppose you bought a house in Sun Valley ten years ago for $100,000.00 (as if!) and five years later the home had increased in value to $500,000.00. You did a cash-out refinance for $420,000.00, paid-off the balance of the original debt and spent the rest. Now the property values in Blaine County are plummeting (as if!) and you can only get $300,000.00 for the property so your lender agrees to a short sale, forgiving $110,000.00 of the re-finance loan amount.

Whether the Mortgage Forgiveness Debt Relief Act allows you to avoid paying income tax on the forgiven debt depends on what you did with the cash-out portion of the re-financed loan. If the money was used to buy a new Range Rover and season tickets to the Metropolitan Opera, you will owe taxes on the forgiven amount. If the money was used to remodel the home or add an addition, you will probably qualify for the exclusion from income tax on that money <u>if</u> you are able to prove the amount of the expenditures.

If instead of a cash-out refinance ("acquisition indebtedness"), you "stripped" equity from the property by getting a revolving line of credit secured by the home, none of the debt forgiven on that line of credit after a short sale is eligible to be treated as excluded income under the Act.

- **<u>Bankruptcies.</u>**

When the lender is **un**willing to "play ball" and entertain a proposed short sale, a beleaguered homeowner may have no alternative left but to seek protection under the U.S. Bankruptcy Code. Under the Code, filing of a bankruptcy immediately imposes what is called an "*automatic stay*." The automatic stay prohibits any debt collection activities against, or communications to, the debtor for a defined period of time. This is intended to give the debtor "breathing room" to prepare a plan of liquidation or reorganization to be submitted to the bankruptcy court for consideration and approval.

In addition to preventing collection activities <u>against</u> the debtor, the automatic stay also materially impacts the debtor's ability to liquidate and transfer assets of the bankruptcy estate, whether those assets are secured or unsecured. This means that if a person has their property on the market and listed with an agent, the filing of a bankruptcy petition during that listing effectively bars the sale of the property unless the bankruptcy trustee appointed by the court approves and authorizes the sale. In other words, the filing of the bankruptcy brings another decision maker (the Trustee) into the process of sale negotiations, including the structure, amount and payment of brokerage fees.

As of this writing there are multiple proposals under consideration by Congress to amend the Bankruptcy Code to address the mortgage credit crisis. Stay tuned to responsible news sources for developments in this area.

Idaho Real Estate Commission
CORE 2008
Case Law

Originally Presented By: TJ Angstman

T.J. Angstman is the Managing Member of Angstman, Johnson & Associates, PLLC. He attended Boise State University and graduated with a Bachelor of Business Administration with a focus on finance. He went on to become a licensed Realtor® in 1990 and although very successful in this profession found a desire to go to law school. He attended the University of Idaho and obtained his Juris Doctor in 1997. With his family and focus being in Boise, he returned to Boise and, upon passing the Idaho State Bar in 1998, he went into private practice, opening his law firm, Angstman, Johnson & Associates, PLLC, in 1998. Because of personal interest in real estate development the firm's primary focus is real estate matters. He has been admitted to practice before the 9th Circuit Court of Appeals and United States Supreme Court since 1998. The firm has experienced substantial growth and now has seven lawyers in its Lakeharbor office. He received the professionalism award from the commercial law and bankruptcy section of the Idaho State Bar in 2001. He has been an active contributor in the real estate industry, as well as the business industry in assisting both business and homeowners resolve their legal dilemmas and makes them understand how to better protect themselves in the future. He continues to maintain a broker real estate license to stay current in the industry and often conducts seminars and workshops in this field.

Realty Antitrust Cases
Bafus, et. Al v. Aspen Realty, et. al.
U.S. District Court Case No. 04-1741

Factual Scenario:

Several Boise Area real estate brokerages were sued in a class action lawsuit involving claims that real estate developers improperly tied the right to purchase lots in a particular development to the agreement by the buyer to utilize the services of a particular real estate brokerage and pay commissions of the sale of homes in the development based upon the price of the home and lot.

These cases achieved class action certification in Federal Court and although the cases were separated for the purposes of trial, the Court issued similar decisions in each of the related cases. In the course of discovery, each of the plaintiff's testified that <u>they would not have utilized **ANY** broker services</u> with regard to their transactions if not forced to do so by the requirements of the developer related to the purchase of their lots. Each of the real estate brokerages filed summary judgment motions raising, among several defenses, a defense that the antitrust laws were not violated because such law are intended to protect competition and where all of the purchasers testified that they would **NOT** have utilized the services of a competitor, there is no foreclosure of competition in the affected markets and therefore, no violation of antitrust laws.

Legal Ruling:

The Court granted the summary judgment motions and relied only upon the argument that no competition was foreclosed by the requirement that the lot purchasers pay commissions to a particular brokerage because the buyers of the homes did not wish to utilize the services of any other broker in connection with the purchase and construction of their home. There was no foreclosure of competition and no liability to the buyers under the antitrust laws.

Applicability to Real Estate Agents:

The case is being appealed in the Ninth Circuit of the Federal Court system. There are several other bases that the court could have utilized to grant summary judgment and dismiss this case. However, the only basis given by the Court is the zero-foreclosure ruling cited above. It is difficult to know whether or not any bright line rule will come about as a result of this litigation. For instance, if a buyer were to testify that they would have utilized the services of a different brokerage, the zero foreclosure argument may not have worked. On the other hand, the brokers have other potentially viable defenses which the court did not need to decide given the decision on zero foreclosure.

Because the case does not articulate a bright line rule for brokers and developers engaging in this activity, it is difficult to know how a court may rule on a different set of facts and therefore, it will be interesting to see how the Ninth Circuit Court of Appeals rules on the appeal. We are hopeful that the decision will give some guidance to brokers and developers for their future conduct.

Commission/Statute of Frauds
Callies, et al. v. Charter Builders, Inc. et al.
Ada County Case No. CV0C0618504

Factual Scenario:

Charter Builders, Inc. is in the business of developing four-plex projects in and around Boise, Idaho. In the course of that effort, Charter Builders began the development of two projects: One in Charter Pointe Subdivision in Boise, Idaho and another related to Silver Oaks Subdivision in Meridian, Idaho. The Charter Pointe project contained 32 four-plexes. The Silver Oaks project contained approximately 70 four-plexes.

At the beginning of the development process, separate limited liability companies were not yet formed for each project. Ms. Callies, the party bringing the Complaint, later became a member in the Silver Oaks, LLC project.

Prior to the subdivisions being approved, Ms. Callies was able to obtain purchasers who would acquire each of the buildings contemplated by the developments. The legal descriptions for the individual buildings did not exist at the time she drafted her Listing Agreements and the Purchase and Sale Agreements.

A dispute erupted between Ms. Callies and Charter Builders, Inc. during the course of construction and completion of the developments. This dispute ultimately resulted in a Complaint being filed by Ms. Callies against Charter Builders, Inc. for, among other things, payment of commissions on these two projects. Charter Builders, Inc. and its principal counterclaimed for slander and declaration that the listing contracts were unenforceable because a legal description was not inserted in the listing contracts at the time of execution. Charter Builders ultimately completed the Charter Pointe Apartment complex and withheld payment on the commissions from Ms. Callies, but compensated the selling agents, as applicable pursuant to separately executed compensation agreements. Construction was never completed on the Silver Oaks project in part because many of the purchasers demanded a refund of their earnest money deposits arguing that they are unenforceable for lack of a valid and enforceable legal description.

Legal Ruling:

The developer argued that the Court should dismiss Ms. Callies' claim for commissions because the statute of frauds and broker require a legally enforceable description be included in every listing contract and that an agreement that fails to meet this requirement is unenforceable as a matter of law. Ms. Callies argued that the listing contracts were supplemented by a legal description which was inserted in her file some time after the listing agreements were signed and that it was unconscionable for the seller to take advantage of the sale contracts and not pay the commissions agreed upon in the listing contracts. The Court ruled that the failure to include a legally enforceable legal description in the contract with the developer rendered the agreement unenforceable as a matter of law. It also ruled that inserting the proper legal description into the file after it was executed is not a proper way to amend the listing contract. The case was dismissed.

This case has been appealed to the Idaho Supreme Court with arguments likely to be scheduled in the Fall of 2008 or Spring 2009.

Applicability to Real Estate Agents and Brokers:

This case stands for the proposition that a real estate agent cannot get paid if her listing agreement is not in writing. That writing must contain a valid description of the property. Failure to include a valid legal description in a listing contract is fatal to the enforceability of the contract at a later date, even if the transaction closes as anticipated. It is pertinent to note that the properties being sold were individual lots in a subdivision.

As best practices advice: Under certain circumstances it may be possible to create a legally enforceable listing contract prior to recording the final plat of for a subdivision. These issues are complicated, so consult with an attorney before trying to create a listing contract on property that is in the process of being subdivided.

(rev 7/21/08)

Contracts

Bach v. Miller

158 P.3d 305, (2007).

Factual Scenario:

The claimant, Miller appealed a decision to the Idaho Supreme Court. The appeal is a result of decision that entitled Bach, the defendant to a monetary award for improvements he had made to property. Bach had filed a suit against Miller, seeking quiet title for four pieces of property. Miller's funds had been used to purchase the property. However, the title to some of the property was in the name of a fictitious company. The court found for Miller and awarded Miller damages for fraud and breach of fiduciary duty claims. The court allowed Miller to elect to choose between receiving quiet title or the damages awarded by the jury. Miller chose quiet title. However, the court found the Bach was entitled to restitution for the value of any improvements he had made to the property.

Miller appealed the ruling that allowed Bach to recover restitution for improvements he made to the property.

Legal Ruling:

The Supreme Court of Idaho found Bach was not entitled to restitution for improvements he had made to Miller's land. The court reasons that Bach was guilty of fraud in relation to the property at issue. Idaho Code § 6-424 allows an occupant of property, who is later found not to be the owner of said property, to recover the costs of improvements made to the property. However, under this statute, the improver must establish two elements. The improver must show that they made the improvements under color of title and that the improvements were made in good faith.

In this case, the court found that Bach could not have made the improvements to the property in good faith. Bach deliberately defrauded Miller. Due to his fraudulent actions, Bach did not have a "good faith belief in his title and cannot be awarded restitution…" The court reversed the previous decision to allow Bach to recover restitution for improvements made to the property.

Applicability to Real Estate Agents:

In order for a claimant to recover for any improvements made to the property, the two-part test set forth by the court must be met. A claimant must show that the improvements to the property were made under color of title and must have been made in good faith. The court asserts that a "misdeed in acquiring color of title automatically negates the good faith of the improver." Failure to establish both of these elements will result in an inability to recover restitution for improvements made to the property.

Chapin v. Linden
162 P.3d 772, (2007).

Factual Scenario:

The Lindens sold a parcel of land to a corporation owned by the Chapins. The corporation, Financial Management Services, Inc. (FMS), conveyed the land to a limited liability company owned by the Chapins, S and F, LLC (S and F). S and F made the payments on the property to the Lindens. The Chapins filed for bankruptcy and as result S and F no longer made payments to the Lindens. The Lindens defaulted on their mortgage. The Lindens sued both the corporation and LLC owned by the Chapins for the money they were owed and for foreclosure of the real estate mortgage. FMS and S and F failed to respond to the suit. The court entered a default judgment and a decree of foreclosure on the property.

The Lindens reacquired the property at a sheriff's sale. However, the Chapins' had a right of redemption that expired one year from the date of the sale. Before the Chapins' right of redemption expired, they made a request for accounting which extended the redemption period by five days. Subsequently, the Chapins made an offer for the purchase of the property to the Lindens. The Chapins wanted to purchase the property from Lindens for $90,000 when the redemption period expired. The Lindens rejected the offer, and countered through their attorney for a price of $125,000 with a down payment of $30,000. The Chapins' attorney accepted the offer of behalf of the Chapins and proposed two additional terms. The Lindens' attorney indicated to the Chapins' attorney that he had not been able to get in touch with the Lindens'. Two days later the Lindens' decided that they no longer wanted to enter into a contract with the Chapins' for the purchase of the property. The Chapins had not exercised their right of redemption. As a result, the Chapins filed suit against the Lindens. The Chapins claimed that they had reached an agreement with the Lindens and therefore the agreement should be enforced. The Lindens contended that enforcement of the agreement was barred by the statute of frauds. The Lindens also claimed that a contract that could be enforced did not exist because the Lindens and the Chapins' never came to agreement as to the material terms of the agreement. The Lindens were granted summary judgment, the Chapins' appealed.

Legal Ruling:

The statute of frauds requires that any agreement for the sale of real property be in writing. If the agreement is not in writing then it is invalid and therefore unenforceable. However, if the purchaser of the property has partially performed on the agreement, the statute of frauds will not preclude specific enforcement of the agreement. The court determined that the enforceability of the agreement between the Chapins and the Lindens would hinge on whether there was a meeting of minds between the parties as to the material terms of the agreement.

The court found that although specific terms such as price and the term of the contract had been proposed, the Lindens did not accept the additional terms after they had been proposed, there was no meeting of the minds. Thus, no enforceable agreement existed. Since there was no meeting of the minds, the court did not address the question of whether part performance would render the agreement in question enforceable. The court found that because the Lindens and the Chapins were still negotiating two material terms of the agreement, the Chapins had no enforceable agreement against the Lindens.

Applicability to Real Estate Agents:

If an agreement is made between parties for the sale of real property, the agreement must be in writing. If the agreement is not in writing it will be found in violation of Idaho's statute of frauds and will be unenforceable by the courts. The parties had not agreed on two material terms of the agreement. The parties must have come to an agreement on all material terms of the agreement before partial performance will even be considered as a defense.

Cannon v. Perry
170 P.3d 393, (2007).

Factual Scenario:

Prospective buyers, the Cannons, wanted to purchase house they had been renting from the Perry's. The Cannons had signed a one-year lease with an option to buy. The Cannon's had trouble obtaining financing. A friend of the Cannons, Sonja Moreno, agreed to purchase the property. A closing date was set for November 30. During the time period before closing, it was decided that Moreno would no longer be the buyer, but would instead hold the property in partnership with Beverly Hinrichs. Hinrichs would purchase the property. There was a delay in closing on the house due to trouble obtaining financing. Because of the change in identity of the buyer, a new contract was signed on December 16, but was dated November 29. The new contract stated a closing date of December 30**.** The parties signed an addendum "extending" this closing date to Dec. 16. The property did not closed by Dec. 16. The buyers were prepared to close on Dec. 30 and signed all closing documents at the title company. However, the Cannons listed the property around Jan. 1 and subsequently accepted an offer from somebody else. The Cannons claim that they were free to sell to another party as the contract had expired. The Perrys contend that the Cannons entered the property and saw the improvements that the Perrys had made and decided to sell the property to somebody else for more money.

Legal Ruling:

The court found that the use of the word "extending" created an ambiguity because the closing date was not extended, it was sooner. The addendum was deemed ambiguous and therefore a jury trial would be necessary to determine the intent of the parties.

Applicability to Real Estate Agents:
The terms of a contract should be clear and unambiguous. If the terms of an original agreement are in any way altered or changed, they must be extremely clear. The intent of both parties should be expressly incorporated. If the terms of the agreement are unclear, it will be very expensive for your clients to litigate the issues and the result will be uncertain and substantial delays will be likely.

FINANCE

Bajrektarevic v. Lighthouse Home Loans, Inc.
155 P.3d 691 (2007).

Factual Scenario:

The Bajrektarevics approached Lighthouse Home Loans in 2003. They wanted to refinance home loan to lock in at a lower interest rate. They were advised by a mortgage banker to "specify a floating interest rate since interest rates were still going down and they might be able to obtain a rate less than 5.125%." Mr. Bajrektarevic indicated to Crowell, the mortgage banker, that he wanted the 5.125% rate to be locked in. Crowell indicated that he had done so. Crowell recommended the Bajrektarevics pursue a Countrywide loan, which they agreed to.   Crowell and Mr. Bajrektarevic signed a lock-in agreement which set the interest rate at 5.125% for a thirty-year term.

At the closing, Mr. Bajrektarevic noticed that interest rate was indicated as 5.375%, different from the 5.125% that he had agreed on and locked-in with Crowell. The Bajrektarvics did not sign the closing documents. They sued for breach of contract. The Bajrektarvics maintained that the 5.375% rate was not what they had agreed to, and they had been unable to find a similar rate anywhere else. Lighthouse maintained that there was no valid written agreement, which was required by the statute of frauds for a loan commitment over $50,000. On a motion for summary judgment, the court found for Lighthouse. The Bajrektarevics appealed the court's decision.

Legal Result:

The court found that the motion for summary judgment should not have been granted as there was enough evidence to create a valid question as to whether or not Lighthouse had breached the lock-in agreement. The court looked to the actual wording of the agreement that both parties signed. The agreement contains language that specifically states that the parties are agreeing to the specified interest rate. The court determined that the 5.125% rate was specifically agreed upon by the parties and therefore summary judgment was not appropriate in this case. The interest rate, as originally agreed to by the parties, was legally binding and could not be changed.

Applicability to Real Estate Agents:

A commitment agreement for a loan needs to be in writing to be enforceable. A lock in agreement is not a loan commitment, however, it is possible to sue a lender for breaching a lock in agreement even in the absence of a loan commitment.

Vanderford v. Knudson
165 P.3d 261 (2007).

Factual Scenario:

Paul Knudson and Richard Greif received loans from Vanderford Company Inc. (Vanderford) for the development of the Pines Townhomes, LLC (the Pines). The Pines was financed by a loan from Vanderford and secured by a deed of trust on the property that was to be improved with the loan. The property did not sell as expected and the LLC could not pay back the loan from Vanderford. Greif and his wife signed two notes and trust deeds. By doing this, the Greifs were personally liable for the Pines construction debt. The Greifs and Knudson disputed the reasoning behind the Greif's signing the notes and trust deeds. The Greifs maintain that they purchased the properties as an investment. Knudson contends that the properties were being held in trust for the LLC and that they were to be used as rentals.

Vanderford filed a suit against the Pines when they were unable to repay the loans. Vanderford wanted to recover $500,000 and foreclose on the trust deeds signed by Greif and his wife. The court found that the Greifs were unjustly enriched by dealing with Knudson. The court awarded Knudson $237,500. The court did not permit Vanderford to foreclose. Both Knudson and Vanderford appealed. Vanderford claims that it should have been allowed to foreclose and to quiet title against the properties. Greif contends that Knudson should not have been awarded compensation for unjust enrichment.

Legal Ruling:

The court found that that a valid contract did exist between the Greifs and Vanderford. However, the court did not allow Vanderford to foreclose against Greif. Vanderford could foreclose against the Pines LLC., but not personally against the Greifs. The notes "did not confer any real property as collateral." The Pines, LLC was the borrower, not the Griefs and that needed to be incorporated into the notes. Additionally, the court found that Knudson's unjust enrichment claim was not barred. A claim for unjust enrichment would be barred if a contract existed between the parties that covered the same subject matter as the claim. However, because there were issues that that the court determined should have been submitted to the jury, the verdict in favor of Knudson's unjust enrichment claim was vacated. The court did not award either party attorney's fees.

Applicability to Real Estate Agents:

A court is likely to find that in the event of foreclosure of a loan taken out in the name entity (in this case, the Pines LLC); a lender can only attempt to foreclose against the entity, not the individuals that make up the entity. If the property is conveyed to individuals, then the notes and deed of trust must reflect that the parties intend the property to be collateral. Further, if the individuals that comprise the entity have a dispute about the property, a court will likely award an individual compensation for unjust enrichment of the other party. This is established by the claimant (Knudson) showing that there was a benefit conferred upon the Greifs, there was a appreciation of the property and retention of that benefit would result in an equitable result.

Brewer v. Washington
2008 WL 1960133 (Idaho)

Factual Scenario:

The Brewers are tenants in common with their aunt (Kinzer) as well as other family members. The Brewers owned an undivided one-sixth interest in the property and Kinzer owned an undivided one-third interest in the property. Kinzer acted as property manager and entered into leases with various companies, one of which was Inland Cellular. The Brewers never gave permission to Kinzer to enter into any leases. Although the Brewers did receive compensation for most of the leases, they never received anything for the Inland Cellular lease. Kinzer maintained that the proceeds from this particular lease were kept as compensation for her duties as property manager. The district court determined that the Brewers were not entitled to rescind the lease. The Brewers appealed.

Legal Ruling:

The court agreed with the Brewers. A co-tenant may lease their individual interest in property. However, a co-tenant must have the permission of all the other co-tenants to lease the property or a portion of the property. The lease with Inland Cellular was for a specific fifty square foot area of the property, this lease excluded the other co-tenants. When a co-tenant has violated this general rule, there are three remedies available to other co-tenants: the contract may be voidable, the co-tenants may seek fair rental value of the property at issue or co-tenants may seek partition of the property. The district court determined that partition was the only remedy available to the Brewers. However, this court found that two other remedies, rescission of the lease and the ability to seek fair rental value, may also be available. Upon this determination, the court remanded the case to the district court to assess what the appropriate remedy is in this situation.

Applicability to Real Estate Agents:

Where there are multiple tenants-in-common to a particular piece of property, all co-tenants must agree to a particular use of either the entire property or a portion of the property. It is important to know who all the co-tenants are and if they have agreed to any lease or contract relating to the property. However, this rule does not apply to the co-tenant's actual interest in the property.

WATER RIGHTS

Joyce Livestock Company v. United States of America
156 P.3d 502 (2007).

Factual Scenario:

A dispute between Joyce Livestock Company (Joyce Livestock) and the United States arose over water rights claimed by Joyce Livestock. Joyce Livestock is a limited partnership. It owned about 10,000 acres on which it ran a cattle operation. Patents issued on the land owned by Joyce Livestock dated as far back as 1898. Joyce Livestock and the United States both filed water right claims in Jordan Creek. Joyce Livestock stated a priority date of 1898. The United States stated a priority of 1934. The issue in this case is an appeal by the United States after a district court determined that Joyce Livestock did have water rights on the federal land.

Legal Result:

To determine whether or not Joyce Livestock did have water right on federal lands, the court used the prior appropriation doctrine. The court determined that the prior appropriation doctrine recognizes that "two or more parties can obtain a right to use water from the same source." Exclusive access to the federal lands at issue was not necessary to obtain a water right. There are two types of water rights, statutory and constitutional. The water right obtained by Joyce Livestock's predecessors was obtained under the constitutional method. Generally, a water right is obtained if one can show that the water was diverted or the water source was modified in some way. However, because the predecessors of Joyce Livestock watered their cattle at the water source, a water right was deemed to have been secured. The method of diversion in this case was the cow's mouth in the stream. The court simply required a showing that the water right was being asserted for a beneficial use, this was satisfied by the act of watering cattle at the water source.
There were three general requirements to obtain a valid appropriation of a water right: the intent to appropriate, physical diversion from the natural water course and application of water to a beneficial use. Idaho now has a statutory procedure for obtaining a water right. It requires a posted written notice at the point of diversion and that construction work on the diversion begin within 60 days after the notice was posted. Today, a diversion is not required to obtain a water right for stock watering.

Additionally, the court addressed the question of whether water right is associated with the property itself (appurtenant), or with the people who occupied the property at the time the water right was granted (in gross). A water right is appurtenant, in other words, or the water right passes with the land. Further, the court determined that in order for a water right to pass with the property, it **does**

not have to be expressly mentioned in the deed. If the water right is intended not to pass with the property, then there must be an explicit expression stipulating that the water right will not pass with the land. A separate writing is also required to convey the water rights separately from the property.

The court addressed some of the additional concerns surrounding water rights. By obtaining a water right to a water source, one does not have the right to control the water source. The court found that a water right will only be deemed to have been abandoned when there is evidence of "a clear, unequivocal and decisive acts" to abandon said right. Non-use does not constitute abandonment.

Applicability to Real Estate Agents:

Water rights are often an issue of contention. Appropriation of a water source requires a showing of intent and the use of water for a beneficial purpose. Although use of water rights requires a diversion of the water, that diversion can be straight from the stream into a cow's mouth. It does not matter if the water is not diverted onto land. The cow can drink the water and return to the property to which the water right will be appurtenant to. A water right is not terminated, unless expressly evidenced in a deed, when the property to which the water right is associated changes owners. Further, if no mention of the water right is made in the deed, the water right will still exist in relation to the property. A water right is deemed to be associated with the property itself, not the occupants. If a water right is not intended to be conveyed with the property, a clear expression of that intent is required.

BANKRUPTCY

Ticor Title Company v. Stanion
157 P.3d 613 (2007).

Factual Scenario:

Richard Stanion filed for Chapter 13 bankruptcy in October of 2003. In June of 2004, Stanion promised to sell a piece of real estate. He entered into a contract for this sale. The bankruptcy court ordered the sale of Stanion's property. The court ordered Ticor Title Company (Ticor) to pay a portion of the sale proceeds of the real estate, $36,438.62, to a bankruptcy trustee. Ticor did not pay a portion of the sale proceeds to the trustee; instead, the entire amount was given to Stanion. Stanion was alerted that Ticor had failed to pay the trustee when he received a notice of default for failure to make a payment as stipulated by his Chapter 13 plan. Stanion sent a demand letter to Ticor, but was referred to their claim department. Stanion attempted to have the bankruptcy court order Ticor to disperse the amount to the trustee. Ticor issued a check to the bankruptcy then brought a suit against Stanion for unjust enrichment. The unjust enrichment claim stemmed from the $36,438.62 that Stanion received instead of the trustee. The district court held that Ticor could not recover from Stanion because the claim was barred by *res judicata*.

Legal Ruling:

Res judicata applies to claim preclusion and issue preclusion. Claim preclusion prevents a claim from being re-litigated against a party. Issue preclusion prevents an issue from litigating an issue that has already been litigated with the same party or that are so closely related to the party that they are considered to be that party (privy) for the purposes of litigation. The court found that Ticor's claim was not barred under issue preclusion because the claims relating to unjust enrichment had not be litigated nor determined in the bankruptcy court. However, Ticor's claim against Stanion was barred by claim preclusion. The court noted that creditors are considered to be in privity with bankruptcy trustees. Although Ticor is not considered to be a creditor, the court barred Ticor's claim, stating that Ticor could have avoided burdening the court will repetitive litigation by resolving this matter in the prior case in bankruptcy court. The court found that if a final judgment has already be issued on a particular cause of action, then all claims that arise out of the same transactions associated with the original cause of action are barred because they should have been litigated in the previous proceeding.

Applicability to Real Estate Agents:

Real estate brokers often have possession of "entrusted funds" the same way the title company did here. In this case, the title company ended up paying the same money out twice because they did not properly handle the entrusted funds. Always be extremely careful with entrusted funds.

BOUNDARY BY AGREEMENT

Griffin v. Anderson

162 P.3d 755 (2007).

Factual Scenario:

The Andersons constructed a fence on a parcel of land. The fence was constructed along the edge of their property as was indicated on a survey conducted in 1975. Another land survey, at a later date, indicated that the original survey had wrongly described the property lines. The Andersons fence had been erected on land belonging to the Avalons. The Avalons had commissioned the second survey that had been conducted. They notified the Andersons of the error that had been made and asserted that they would allow the fence to remain until the Anderson's sold their land. In October of 2001, the property owned by the Avalons was conveyed to Griffin. Griffin filed an action against the Andersons, seeking to quiet title for the land on which the fence was located. The Andersons claimed that they had adversely possessed the land and that a boundary by agreement existed. The district court ruled against the Andersons and found that the Griffin's deed contained the strip of land. This case is a result of an appeal by the Andersons.

Legal Ruling:

The court found that the existence of fence is sufficient to constitute a boundary line, even if the boundary line as determined by the fence varies from the actual boundary line. The existence of a fence constitutes an implied agreement between the property owners, so long as the fence is treated as a boundary between the properties. However, the court does recognize that there are exceptions to this determination. If the fence was constructed to serve a purpose other than as a boundary marker, the court will not construe it as such at a later date. In this case, the exception applied because the fence was originally constructed to keep cattle on the property. Therefore, since the fence was not constructed to serve as a boundary marker, the Andersons could not later assert that it now served as one.

Applicability to Real Estate Agents:

An agent should recognize that fences are not necessarily good evidence of a property boundary. Iit is important to note that if it can be established that the fence was erected to serve a purpose other than a boundary marker, then the court may not find that it can be asserted as such if the fence does not accurately reflect the boundary line of the property. Always recommend a survey if actual boundaries are important to a client or customer.

Downey v. Vavold
166 P.3d 382 (2007).

Factual Scenario:

The Valvold Family Trust (Trust) owned about six acres of property. The property was formally owned by another person who constructed a fence along one side of the property boundary. The fence was constructed about six to ten feet in from the owner's boundary. There were four other parcels of land that bordered the property at issue. All but one of the owners of those four parcels purchased their properties after the fence was constructed. All of the owners believed that the fence was the boundary between their properties. When the Trust purchased the property, they were told that the boundary of the property was west of the fence. The owners of the properties bordering the Trust's property appealed a decision by the district court that that the doctrine of boundary by agreement did not apply as there was no agreement between landowners that fixed the fence as the boundary between the properties.

Legal Ruling:

A boundary by agreement must satisfy two elements. First there must be an uncertain or disputed boundary and second there must be a subsequent agreement fixed the boundary. A boundary by agreement can be established by either agreement or acquiescence. An agreement may be inferred if one party does not raise an issue to the other party's "use of the disputed property." However, if a period of acquiescence exists, the court is not required to find that a boundary by agreement exists. In this case, there was no express agreement between the party's establishing the fence as the boundary. Additionally, the court found that acquiescence did not create a boundary by agreement either. The court determined that the neighbors' should have notified the owner of the property "that they were claiming the fence was the boundary." The court upheld the district court's finding that fence on the Trust's property did not serve as the boundary between the properties in question.

Applicability to Real Estate Agents:

In some instances, a fence between properties is indicative of the boundary between the properties. In cases where the boundary is disputed, it must be shown that either an express or implied agreement fixed the boundary between the properties. Always recommend a survey.

CC&Rs

Birdwood Subdivision Homeowners' Association, Inc. v. Bulotti Construction Inc.
175 P.3d 179 (2007).

Factual Scenario:

A Homeowner's Association and resident are trying to prevent Bulotti Construction, Inc. (Bulotti) from sub-dividing a lot. After the plat was recorded in 1981, on the same day, but before the plat was recorded, covenants for the subdivision were recorded with the county by two of Bird's children. Bird was the original owner of the property. There is no indication that Bird's children had the authority to act on her behalf. The covenants provided that only one dwelling could be on each lot. Bulotti contracted to buy a lot in the subdivision in 2003. The company sent a letter to the residents of the subdivision asking that amendments to the covenants be made so the lot purchased could be subdivided. The amendments were not made. Action was brought against Bulotti to ensure the lot was not subdivided. Bulotti contended that the covenants could not be applied to him.

Legal Ruling:

Bird, as the original owner/developer of the subdivision should have signed the covenants. Covenants signed by her children do not bind the land. Bird's later conveyance of the property does not mean she accepted the covenants. The ratification of the covenants is a separate transaction never completed by Bird. A reference to the covenants does not equate incorporation. Bulotti cannot be stopped from taking a position contrary to his original request to amend the covenants.

Applicability to Real Estate Agents:

Covenants must be signed by the original owner of the land. Any other signature will result in a set of covenants that do not bind the property. There must be an explicit ratification of covenants by the actual original owner in order to create a binding set of covenants.

Thompson v. Ebbert
160 P.3d 754 (2007).

Factual Scenario:

The Sawtooth Condominiums were constructed by the Ebberts. In the Condominium Declaration, a condominium unit is defined "as being contained within interior surfaces of perimeter walls, including the interior surfaces of the perimeter walls, including the interior of any storage areas and garages." The Declaration also stipulates that ownership of a garage is "preconditioned on the ownership of a residential unit." The Ebberts sold their condominium to Polly Cooke. Cooke did not want to pay the full price for the condo. The Ebberts and Cooke agreed that for a lower price on the condo, the garage associated with the unit would be leased to Mrs. Ebbert for fifty years. The lease was recorded in Blaine County. Cooke sold the unit; the purchasers again sold the unit to Dennis Thompson.

Thompson subsequently filed a complaint seeking quiet title. He stipulated that the lease was invalid because if violated the Declaration. Thompson stated that he had no knowledge of the lease when he bought the unit. The district court determined that the lease did violate the Declaration and ruled in favor of Thompson. The Ebberts appealed the decision in this case.

Legal Ruling:

The court upheld the decision of the district court, ruling in favor of Thompson. The court found that "no part of a Condominium or of the legal rights comprising ownership of a Condominium may be separated from any other part…" The Unit was conveyed to include the garage. The garage was an integral part of the Unit as stipulated by the Declaration. The lease of the garage to Mrs. Ebbert was determined to be an encumbrance on the property and a violation of the Declaration, rendering the lease void. The Declaration did not allow for the lease of only a portion of the condo, to satisfy the Declaration would have required the lease of the entire Unit.

Applicability to Real Estate Agents:

The term Unit included both the garage and dwelling unit. In this instance the covenants prohibited severing these portions of the unit from each other. Thus, careful review of the CCRs is needed when considering creative transactions.

Idaho Real Estate Commission

CORE 2008

Legislative Update

Originally Presented By: Miguel Legarreta

Miguel Legarreta is the Director of Public Policy at Ada County Association of REALTORS®. He is a lifelong Idaho residente. He attended the College of Idaho and worked in the private business sector until Governor Kempthorne asked him to work for his administration. Miguel worked in the Governor's Office four years and had an opportunity to be involved with a number of public policy issues. Miguel then went to work for the Building Contractors Association as their Government Affairs Director, before joining the Ada County Association of REALTORS®. While with the BCA, Miguel worked on a number of important issues including contractor registration and impact fees ensuring the government not place undue burden on the building industry. Since joining ACAR, Miguel has been involved in a number of the important issues including the community college campaign, local comprehensive plans, sales price disclosure, and tax on services. Miguel is a strong advocate for private property rights and will continue to protect the real estate industry and is committed to enhancing our communities.

Talking points for 2008 legislative overview

You probably have read about a number of these issues with questions about how legislation will affect REALTORS® and provide a background to better understand how the legislation presented from the 2008 legislature affects the way you do business.

The following is a review of the legislation that passed in 2008 and how it affects real estate licensees.

S 1251- IREC Education Bill (sponsored by IREC and IAR)

This bill was developed through the collaborative efforts of the Real Estate Commission and the REALTOR Association, and it includes some of the recommendations for which a law change is required.

1. Shortens the period of time from five years to three in which an applicant must complete his sales associate or broker prelicense education. (There is no increase proposed in the number of hours of required prelicense education – currently 90 hours for sales associates and a minimum of 90 hours for brokers.)

- Assures applicants have the most up to date and relevant information as they prepare to enter the profession
- There are more real estate schools and courses available than ever before, and courses are now available to more applicants throughout the state through the use of technology such as interactive video conferencing
- The Commission has also added more courses that are accepted for broker prelicense, so the applicants have more offerings available to them

2. Adds a phrase to clarify that it is the Commission's responsibility to determine whether a continuing education course fits within the Commission's approved topics.

- Licensees are required to take continuing education every two years to renew their licenses
- The Commission has established approved topics for CE in its administrative rule 402

3. Establishes a retention period of five years for a real estate course provider to keep student attendance and pass/fail records. There is currently no time period specified in the law.

- Allows course providers to purge out-of-date documents after a reasonable time rather than maintain them indefinitely.

Idaho law in affect July 1, 2008

S 1257 IREC Housekeeping Bill

This is the Real Estate Commission's annual update legislation and contains three changes to the Idaho real estate license law.

1. Adds a definition of "business day"

- The term is used but not presently defined in the license law
- The proposed definition corresponds with the definitions commonly used in other sections of Idaho Code.

2. Date change to update the definition of the Real Estate Settlement Procedures Act, or RESPA.

- The Commission does not enforce RESPA, but the license law refers to that law for the definition of a prohibited "kickback".

3. Sets forth the Commission's certification fees for real estate instructors, providers and courses.

Certification fees are currently referenced in the license law. For example, the requirement for instructor certification in 54-2033(2)(b)(i) includes submitting a completed application with all "required fees", but the amount of the fee is not stated in the law.

- The Commission currently collects certification fees in these exact amounts.
- No fee increase is contemplated.
- The Commission would have the ability to lower these fees by administrative rule.

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HB 417 and HB 465 – Transitional Housing in Idaho

Transitional housing is a relatively new and expanding market in Idaho. Transitional housing is primarily a commercial, for-profit, venture. Left unregulated, transitional houses have been moving into residential neighborhoods across the state.

There appears to be a strong economic incentive to buy residential property, convert it to a commercial transitional house, and move paroled criminals into residential neighborhoods. As you can imagine, this practice has caused significant concern on the behalf of existing residents, many of whom had no notice of, and no ability to have any impact on, a commercial use moving into their neighborhood. There has also been significant disruption to local real estate markets caused by the unregulated sighting of transitional homes.

Idaho law is currently silent regarding local government ability to zone and regulate the placement of transitional housing. In this regard, Idaho law is actually more restrictive than federal law.

417 – Limit of two sex offenders in an approved residence.

465 – Federal law had an exemption in the fair housing act says you can't treat these people any differently. Actively on parole you can create zoning regulations on the local level – puts in the local level. Local jurisdictions can create an ordinance for a use permit to put it in an area. A conditional use permit will be necessary for the siting of transitional housing.

This is something that real estate licenses should be aware of, no changes to disclosure but they should know the process. There is now legal ordinance for siting of this type of housing. Local jurisdictions will begin establishing ordinances about siting these transitional houses, some communities will have the ordinances and others may not, this is important information to a number of clients.

Idaho law now in affect

HB 578 – Community Infrastructure Districts

CIDs provide a needed tool to allow local communities to plan for, and pay for, the costs of growth in Idaho.

Community Infrastructure Districts can only be formed in areas where local governments have taken the time to plan for growth by including the district in their comprehensive plan, encouraging planning by local governments. We believe this to be a positive component to the legislation that allows for another layer of public input into the process.

Community Infrastructure Districts are another mechanism for local governments to be able to plan for growth, while ensuring that growth pays for itself. An added benefit for the state is that as we are able to finance infrastructure in this manner – especially if the infrastructure may have traditionally been financed through the Idaho Department of Transportation budget process – you can free up existing tax dollars to address other important maintenance needs across the state.

There will be a record against the property, a title search will recover the information, CIDs will generally be completed pre-development

The form disclosure shall be entitled "CID TAX AND SPECIAL ASSESSMENT DISCLOSURE NOTICE" and shall specifically and conspicuously set forth "YOU ARE PURCHASING REAL PROPERTY THAT IS INCLUDED WITHIN THE BOUNDARIES OF A COMMUNITY INFRASTRUCTURE DISTRICT."

Idaho law in affect July 1, 2008

H491a - Deeds of Trust Legislation

HB 491a would increase lending options for certain properties between 40 and 80 acres in Idaho.

Current law allows Deeds of Trust to be utilized on properties inside city limits (regardless of size), and properties up to 40 acres outside city limits. HB 491a moves that 40 acre limit to 80 acres for properties not principally used for agriculture. The legislation also eliminates some vague language in the statute – essentially clarifying that the limit is actually 80 acres at the maximum for these properties.

Deeds of trust are a financing method commonly used in the conveyance of real property in Idaho. The vast majority of home loans in Idaho are secured with a deed of trust. Currently, properties over 40 acres that are not completely located inside a city have to be financed with a Mortgage rather than a Deed of Trust. In Idaho there are a limited number of companies that provide Mortgages on these types of properties. In contrast, there are dozens of companies that will finance the property with a Deed of Trust.

This legislation opens up more lending options for transactions between 40 and 80 acres in Idaho.

Idaho law in affect July 1, 2008

HB 1401 – Confidential Real Estate Information

- SB 1401 amends Idaho real estate license law to clarify that sale prices are not confidential client information for a licensed real estate agent.
- This change is consistent with the way the statute has generally been interpreted, and enforced.
- The law will give certainty to the agent and the MLS regarding the process which has been in place, and been the industry practice for decades.
- This has the overall benefit of ensuring accurate sales price data in the MLS which allows for more accurate information to consumers regarding listing prices.
- The legislation clarifies the law and allows for better data in the marketplace by eliminating the confusion caused by the existing language. The legislation does not change traditional practices in the marketplace.
- Some MLSs have lost 30-40% of their listing data as a result of the confusion created by the existing language.
- A necessary bill because it would allow for accurate data to be presented in the marketplace. Local MLSs cooperate with Assessors to provide access to the data.

- The majority of counties has access to MLS data at the current time, and traditionally has had that access. Currently there are issues with regard to the agreements between counties and MLSs allowing access.
- Approximately 90% of all residential sales are traditionally reported to the MLS. This gives Assessors and agents the ability to accurately assess values and listing prices.
- This legislation removes price from being considered “confidential client information.”

Idaho law in affect July 1, 2008

H 599 Personal Property Tax Exemptions

Provides that a taxpayer's list of taxable personal property may be amended to permit certain property to be listed or removed from the list; to provide that personal property shall be exempt from taxation; to provide a schedule for the personal property tax to be phased out; and to provide for distribution of sales tax moneys to counties and taxing districts. Legislators were able to come to a compromise on the personal property tax elimination for business for the first time in history. The most positive aspect of the legislation is that, when the state revenues finally exceed five percent, up to $100,000 of personal property value per business will be exempted from being assessed the tax. While compromise was a good thing, there are several important problems that remain unresolved. First, even though a business may be below the $100,000 threshold, they will still be required to track all new and existing personal property because there is no mechanism in the legislation to ever phase out the tax.

This is relevant to the small business owner or real estate sales person to be aware they need to track personal property in a home office and pay taxes, eventually those taxes will be phased out but the tracking of equipment will still be required.

Law, but will not take affect until State revenues exceed 5%

Conclusion:

In the 2008 legislature the real estate industry was affected in by changed educational standards, disclosure of sales price information, location of transitional houses, new taxing districts, and personal property taxes.

Mortgage Fraud…Even In Idaho
Handout

1. **Fraud in the real estate industry usually occurs through:**
    a. Misrepresentation
    b. ___________________
    c. ___________________

2. **Report suspected mortgage fraud to:**
    a. Designated Broker
    b. _____________________________
    c. _____________________________

3. **Mortgage Fraud Red Flags**
    a. Money back at closing
    b. ___________________________
    c. Mortgages don't match
    d. ___________________________
    e. ___________________________
    f. Items not recorded
    g. ___________________________
    h. ___________________________
    i. Unreasonable sweat work

4. **Common Fraud Schemes**
    a. Illegal property flipping
    b. _______________________
    c. _______________________
    d. Stolen Identity
    e. _______________________
    f. Equity Skimming